IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 406

RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*,

v.

EMMA SHANNON AND RICHARD J. SHANNON, d/b/a E. AND R. SHANNON, *Appellees*.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL OR TO AFFIRM

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Appellants, Red Ball Motor Freight, Inc., and the other appellants named in appendix A hereto oppose the motion to dismiss the appeal or to affirm, without further hearing, the judgment of the lower court.

1. The motion itself demonstrates the need for the construction by this Court of the provisions of section 203(c) of the Interstate Commerce Act, 49 U.S.C. § 303(c). As alleged by the appellee (Motion, p. 8 *et seq.*), the 1958 amendment, 72 Stat. 574, did incorporate the "primary business test" of *Brooks Transportation Co.* v. *United States*, 93 F. Supp. 517, 522 (E.D. Va. 1950), aff'd. mem., 340 U.S. 925 (1951), for determining whether considered trucking operations came within the partial exemption from regulation accorded a private carrier of property by motor vehicle by section 204(a)(3) of the Act, 49 U.S.C. § 304 (a)(3). However, it did much more.

The legislation was intended to,[1] and did, close a loophole in the regulatory scheme. No longer was it to be necessary in finding an operation unlawful, to establish that the transporter "held himself out to the public as a [common] carrier", *Interstate Commerce Com'n* v. *Woodall Food Products*, 112 F. Supp. 639, 641 (N.D. Ga. 1953), aff'd, 207 F. 2d 517 (5th Cir. 1953), or that, as a contract carrier, it had an "express contract for such a carriage for hire", *Taylor* v. *Interstate Commerce Commission*, 209 F. 2d 353, 355 (9th Cir. 1953), cert. denied, 347 U.S. 952 (1954).[2] Though the activities may not be such as to bring the transporter within the statutory definitions of common or contract carriage, 49 U.S.C. §§ 303(a)(14) & 303(a)(15), they nevertheless are prohibited "unless such

[1] The 70th Annual Report of the Interstate Commerce Commission 161-62 (1957), stated the problem, as follows:

"There is a large area of motor transportation which, although cloaked with the form of private transportation, is not, in our opinion, private carriage as defined by the courts in the Lenoir Chair case (*Brooks Transportation Co.* v. *United States*, 340 U.S. 925).

"The principal business of persons engaged in this type of activity is, in fact, transportation, and the movement or carriage of property performed by them is not in furtherance of any primary or bona fide business enterprise other than transportation. Because the act defines common carriage and contract carriage specifically, the courts tend to construe these definitions strictly. This has left an area in which persons are engaging in the business of moving goods but which is regarded not subject to regulation as common or contract carriage. This situation does not give to the public the protection which it should receive and creates unstable conditions in the transportation industry because unauthorized for-hire transportation is fostered through various devices. We therefore recommend that Congress amend the act as appropriate."

[2] The *Taylor* case was discussed in the 68th Annual Report of the Interstate Commerce Commission 82 (1954).

transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person." See S. Rep. No. 1647, 85th Cong., 2d Sess. 5, 23-25 (1958); H. R. Rep. No. 1922, 85th Cong., 2d Sess. 17-19 (1958); 104 Cong. Rec. 10818; 104 Cong. Rec. 12535.

The change in the law[3] obviates the need for such a finding as the appellees contend the Commission was required to enter (Motion, pp. 20-22), for, once the Commission concludes, as it did (81 M.C.C. 337 at 347, J.S. of U.S. and I.C.C., p. 23a) that the transportation is not within the scope, or in furtherance, of a primary, non transportation business, it matters not whether the unauthorized and, hence, proscribed, transportation is that of a common carrier by motor vehicle or that of a contract carrier by motor vehicle. Cf. *Vince* v. *Interstate Commerce Commission*, 267 F. 2d 577 (9th Cir. 1959); *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (10th Cir. 1958); *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210, 212 (5th Cir. 1941).

2. The conflict of lower court decisions cannot be explained away, as appellees attempt (Motion, pp. 10-12), by the crucial facts. Appellees do not so much

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[3] The change in the law occurred between the time that the examiner submitted his report and recommended order on August 29, 1957, and the time the Commission, Division 1, served its report on August 11, 1959. Not only was it appropriate under the circumstances for the Commission to reach its own conclusions upon the examiner's recital of the facts, *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 364 (1955); *W. J. Dillner Transfer Co.* v. *Interstate Commerce Commission*, 193 F. Supp. 823, 827-28 (W.D. Pa. 1961), aff'd mem., 368 U.S. 6 (1961); it was obliged to consider the matter under the provisions of the Act as amended. *Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 78 (1943).

as mention the decision of the United States District Court for the Southern District of Alabama in *Cahaba Steel Co.* v. *United States,* Civil Action No. 2669, decided January 17, 1962, in which the facts as found by the Commission in *Cahaba Steel Co.—Investigation of Operations,* 86 M.C.C. 759, 760-62 (1961), were virtually foursquare with those in the instant case.

Neither in the Cahaba case nor in *Church Point Wholesale Beverage Co.* v. *United States,* 200 F. Supp. 508 (W.D. La. 1961), was there any greater attempt made to conceal the dealings in the transported commodities than here. In each instance the transactions were conducted openly; however, this did not make them in their consequences, any the less a subterfuge to escape economic regulation of the for-hire motor transportation rendered.

The appellees ask the rhetorical question: What more might they have done to be considered legitimate sugar merchants? Motion, pp. 17-18. The obvious answer is that they might have attempted to promote their sugar business beyond the intermittent needs for loads of freight for their returning vehicles, but there was no evidence that they had done so. They might have employed commission salesmen or brokers to develop or expand their territory, but there was no evidence that they had done so. They might have made large-scale purchases of sugar, dealt in futures or engaged in hedging operations, but there was no evidence that they had done so. They might have dealt in beet sugar from Colorado or California, to which they didn't operate their trucks, but there was no evidence that they had done so. Indeed, they might have handled sugar in all respects as they did their other business.

On the contrary, the appellees make no attempt to deny that ordinarily they deal in sugar only by making

spot purchases of sugar at the Supreme refinery when an empty vehicle returning to San Antonio happens to be in the vicinity. They make no attempt to deny that the purpose of their transportation of the sugar is to profit from the transportation as such, not to further a nontransportation enterprise. It is this factor apparently ignored by the court below in evident disregard of its pertinency, that commands further consideration by this Court in the light of the change in the law wrought by the 1958 amendment.

CONCLUSION

We submit, therefore, that the appellees' Motion clearly demonstrates that the decision below poses substantial questions warranting plenary consideration by this Court, and that the Motion should be denied.

Respectfully submitted,

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APPENDIX A

The following intervening defendants do hereby participate in this Brief in Opposition to Motion to Dismiss Appeal or to Affirm:

(1) Red Ball Motor Freight, Inc.

(2) Brown Express, Inc.

(3) Texas-Arizona Motor Freight, Inc.

(4) Central Freight Lines, Inc.

(5) The Atchison, Topeka and Santa Fe Railway Company

(6) Chicago and North Western Railway Company

(7) Chicago, Burlington & Quincy Railway Company

(8) Chicago Great Western Railway Company

(9) Chicago, Milwaukee, St. Paul and Pacific Railroad Company

(10) Chicago, Rock Island and Pacific Railroad Company

(11) Great Northern Railway Company

(12) Illinois Central Railroad Company

(13) The Kansas City Southern Railway Company

(14) St. Louis-San Francisco Railway Company

(15) Soo Line Railroad Company

(16) Union Pacific Railroad Company

(17) Wabash Railroad Company

(18) The Western Pacific Railroad Company

(19) Texas Tank Truck Carriers Association, Inc.

(20) Regular Common Carrier Conference of American Trucking Associations, Inc.